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Supreme Court, U.S.
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(1)
No. _____ 071337 APR 21 2008

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In The

Supreme Court of the United States

JUAN CARLOS CALDERON-DOMINGUEZ,

Petitioner,

v.

MICHAEL B. MUKASEY,
UNITED STATES ATTORNEY GENERAL,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1) May the Fifth Circuit, consistent with the categorical approach mandated by this Court in *Taylor v. United States*, 495 U.S. 575 (1990) and *Shepard v. United States*, 544 U.S. 13 (2005), speculate as to the underlying facts and consult extraneous documents, not forming part of the official conviction record, when determining whether an alien's state court conviction constitutes a crime involving moral turpitude (CIMT) under federal immigration law?

(2) Does the commission of an aggravated felony by an alien who only adjusted to lawful permanent resident (LPR) status after his original entry into the United States render the alien ineligible to seek a waiver under INA § 212(h); 8 U.S.C. § 1182(h)?

PARTIES TO THE PROCEEDING

The Petitioner here is Juan Carlos Calderon-Dominguez.

The Respondent here is Michael B. Mukasey, United States Attorney General.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Juan Carlos Calderon-Dominguez, respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case and that the judgment of the Fifth Circuit be vacated.

OPINION BELOW

The opinion for the United States Court of Appeals for the Fifth Circuit, which is unreported, is available at *Calderon-Dominguez v. Mukasey*, Slip Copy, 2008 WL 64664 (5th Cir., Jan. 7, 2008).

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Fifth Circuit denied Petitioner's motion for rehearing (en banc) on February 26, 2008. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254.

STATUTORY PROVISIONS INVOLVED

INA § 237(a)(2)(A)(ii); 8 U.S.C. § 1227(a)(2)(A)(ii) (permitting removal of those aliens committing two or more crimes involving moral turpitude)

INA § 212(h); 8 U.S.C. § 1182(h) (permitting a certain subset of aliens to apply for a discretionary waiver)

TEX. PEN. CODE § 22.01(a) (general assault statute)

STATEMENT OF THE CASE

Petitioner, a native and citizen of Mexico, was admitted to the United States on or about April 23, 1973. He adjusted to lawful permanent resident status on or about April 25, 1973.

On October 18, 1990, Petitioner was convicted of conspiracy to possess with intent to distribute marijuana. Administrative Record Before the Fifth Circuit (A.R.) at 124, 132. An Immigration Judge waived any inadmissibility or removability for this offense on June 8, 1993 under former INA § 212(c); 8 U.S.C. § 1182(c) (now repealed). A.R. at 122.

In 1999, Petitioner was convicted of assault under § 22.01 of the Texas Penal Code,[1] a Class A

[1] The relevant section states that a person commits an assault if he:

> (1) intentionally, knowingly, or recklessly causes bodily injury to another, including the person's spouse;
>
> (2) intentionally or knowingly threatens another with imminent bodily injury, including the person's spouse; or

(Continued on following page)

misdemeanor, for which he served thirty days in jail. A.R. at 104. The record of conviction, notably, was silent as to the specific subsection under which Petitioner pleaded guilty, the victim of the assault, and the mode and method by which Petitioner carried out his assault. *Id.* Moreover, the conviction record included an *affirmative finding*, made by the Texas trial judge, that Petitioner's assault involved no family violence. *Id.*

In 2004, the Department of Homeland Security (DHS) filed a Notice to Appear against Petitioner, charging him as removable for committing a crime of domestic violence, *see* INA § 237(a)(2)(E)(i); 8 U.S.C. § 1227(a)(2)(E)(i), and for committing two crimes involving moral turpitude. *See* INA § 237(a)(2)(A)(ii); 8 U.S.C. § 1227(a)(2)(A)(ii). A.R. at 158-59.

The Immigration Judge (IJ) found Petitioner removable, erroneously ruling that a general conviction under § 22.01(a) of the Texas Penal Code constituted both a crime of domestic violence and a crime involving moral turpitude. A.R. at 63-64. Significantly, the IJ conducted no categorical analysis of § 22.01(a); she failed to ask if the elements necessarily proven at

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> (3) intentionally or knowingly causes physical contact with another when the person knows or should reasonably believe that the other will regard the contact as offensive or provocative.

TEX. PENAL CODE ANN. § 22.01(a). Violating § 22.01(a)(1) constitutes a Class A misdemeanor, while only a Class C misdemeanor attaches to a violation of §§ 22.01(a)(2) and (3). *See* TEX. PENAL CODE ANN. § 22.01(b) and (c).

trial constituted a CIMT for immigration purposes. Rather, the IJ's ruling that Petitioner's conviction constituted a CIMT rested entirely on her inference, drawn from an unsubstantiated affidavit, *see* A.R. at 102, that the offense "involve[d] assault against a family member which resulted in injury." A.R. at 63. The IJ further found Petitioner ineligible for discretionary relief under INA § 212(h); 8 U.S.C. § 1182(h). A.R. at 64.

The Board of Immigration Appeals (BIA) later affirmed the IJ's decision without opinion. *See* A.R. at 2. Petitioner then appealed to the Fifth Circuit, which properly exercised its jurisdiction as to constitutional claims and questions of law. *See* INA §§ 242(a)(2)(D), 242(b); 8 U.S.C. § 1252(a)(2)(D) and 8 U.S.C. § 1252(b). Because the BIA adopted the opinion of the IJ with respect to the determination that Petitioner's prior conviction constituted a CIMT, the Fifth Circuit reviewed the merits of the IJ's opinion. *See Li v. Gonzales*, 420 F.3d 500, 506 (5th Cir. 2005) (stating that the circuit court reviews "only an order of the BIA . . . unless the IJ's decision has some impact on the BIA's decision"), *vacated on other grounds*, 429 F.3d 1153 (5th Cir. 2005).

The Fifth Circuit affirmed the opinion of the BIA and the IJ, claiming that the Fifth Circuit was permitted to look beyond the statutory language and the record of conviction to determine whether Petitioner's conviction constituted a CIMT. *See Calderon-Dominguez v. Mukasey*, Slip Copy, 2008 WL 64664 (5th Cir., Jan. 7, 2008). The circuit court opinion

further denied Petitioner's claims to discretionary relief under § 212(h), 8 U.S.C. 1182(h). *Id.* at *2. Petitioner timely filed a motion for rehearing (en banc), which was denied on February 26, 2008. This timely petition then followed.

REASONS FOR GRANTING THE PETITION

I. The Fifth Circuit Failed to Correctly Apply the Categorical Approach in Determining That Petitioner's Conviction Constituted a Crime Involving Moral Turpitude (CIMT); Its Reliance on Unproven Facts, Rather than the Statutory Language, When Making This Determination Cannot Support a Charge of Removability and Petitioner's Removal Proceedings Should Be Terminated.

The instant petition for a writ of certiorari presents a simple question: may the Fifth Circuit, consistent with the categorical approach mandated by this Court in *Taylor v. United States*, 495 U.S. 575 (1990) and *Shepard v. United States*, 544 U.S. 13 (2005), speculate as to the underlying facts and consult extraneous documents, not forming part of the official conviction record, when determining whether an alien's state court conviction constitutes a crime involving moral turpitude (CIMT) under federal immigration law? The guidelines issued under the aegis of this Court, as well as the Fifth Circuit's own

precedent decisions, strictly forbid such judicial fact-finding and speculation.

In fact, the record shows that the Fifth Circuit, failing to limit "the scope of its inquiry," attempted to ascertain "what the [alien] did in fact," not "what the [alien] was convicted of." *Abdelqadar v. Gonzales*, 413 F.3d 668, 672 (7th Cir. 2005) (internal citations omitted). In so doing, it clearly abrogated its duty to adhere to this Court's previous holdings. Moreover, Congress has expressed its desire that "the immigration laws of the United States should be enforced vigorously and *uniformly*," *see* Immigration Reform and Control Act of 1986, Pub. L. No. 99-603 § 115, 100 Stat. 3559, 3384 (1986) (emphasis added), and the Fifth Circuit's ruling, by materially departing from the approach used by this Court and the other circuit courts, contravenes congressional intent and creates pockets of unpredictability in the federal judiciary. Finally, the Fifth Circuit's questionable reasoning, motivated by emotion rather than law, displays a callous disregard for Petitioner's rights to Due Process and Equal Protection under the Constitution. *See* U.S. Const. amend V and XIV.

The indefensible opinion handed down by the Fifth Circuit will, if left uncorrected, result in Petitioner's removal from the United States and his separation from his wife and two United States citizen children, the far-reaching consequences of which need not be overstated. For these reasons, Petitioner prays this Court issue a writ of certiorari and vacate the judgment of the Fifth Circuit.

A. The Categorical Approach Employed in *Taylor* and *Shepard*, Applicable in the Immigration Context, Requires Courts to Look to the Statute Under Which the Alien Was Convicted, Rather than Look to the Underlying Facts, to Determine Whether the Offense Falls Within a Particular Definition.

Put simply, when determining whether a conviction falls within a statutorily defined removable offense, circuit courts are under charge to analyze only the statutory language under which the alien was convicted. If the language, on its face, does not constitute the removable offense, the inquiry must end and the charge of removability cannot be sustained.

In Petitioner's case, the Fifth Circuit investigated extra-judicial documents and constructed its own version of disputed facts rather than restrict its inquiry to the statutory language. By so doing, the circuit court exceeded the bounds of permissible conduct, trampled on Petitioner's rights to Due Process and Equal Protection, and issued an erroneous opinion meriting reversal.

1. The Categorical Approach Is Applicable in the Immigration Context.

The Supreme Court approves of using the *Taylor* approach when determining "whether a conviction . . . falls within the scope of a listed [immigration] offense"

Gonzales v. Duenas-Alvarez, 127 S. Ct. 815, 818 (2007); *see also Abdelqadar v. Gonzales*, 413 F.3d 668, 672 (7th Cir. 2005) (noting the Supreme Court's approval of the categorical approach in the immigration context).

2. The Categorical Approach Requires Courts to Look to the Statute Under Which the Alien Was Convicted, Rather than the Underlying Facts, to Determine Whether the Offense Falls Within a Particular Definition.

The Supreme Court has issued clear guidelines for determining whether a predicate offense fits within a given statutory definition (*e.g.*, "aggravated felony" under INA § 101(a)(43); 8 U.S.C. § 1101(a)(43), or "crime involving moral turpitude" under INA § 237(a)(2)(A)(i)(I); 8 U.S.C. § 1227(a)(2)(A)(i)(I)) when a given statutory scheme (*e.g.*, the INA) lacks its own methodology. When a circuit court is faced with making such a determination, the Supreme Court requires adherence to a "categorical approach." *See Taylor* and *Shepard*, *supra*.[2]

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[2] Very little disagreement exists among the circuit courts regarding this point. Nearly every circuit court employs the categorical method, approved of in *Taylor* and *Shepard*, in the immigration context. *See, e.g.*, *Conteh v. Gonzales*, 461 F.3d 45, 53-56 (1st Cir. 2006); *Chery v. Ashcroft*, 347 F.3d 404, 407 (2nd Cir. 2003); *Partyka v. Attorney Gen. of the United States*, 417 F.3d 408, 411 (3rd Cir. 2005); *Soliman v. Gonzales*, 419 F.3d 276,

(Continued on following page)

This categorical approach consists of two steps. *Taylor*, 495 U.S. at 602. First, when conviction under the predicate statute necessarily involves every element satisfying the definition of a CIMT, the "mere fact of conviction establishes that the putative predicate crime was" a CIMT. *Conteh v. Gonzales*, 461 F.3d 45, 53 (1st Cir. 2006).

Second, if the underlying statute is overbroad, in that it encompasses some conduct that would constitute a CIMT and some that would not, the predicate offense will only qualify as a CIMT if the record of conviction shows that the alien was *actually* convicted of the elements necessary to sustain a CIMT charge. *Id.* Furthermore, if the statute is divisible into discrete subsections, "violations of one or more of which would meet the criterion at issue," circuit courts may "look to the record of conviction to determine whether the conviction was necessarily for a particular subsection of that statute that meets the

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284 (4th Cir. 2005); *Omari v. Gonzales*, 419 F.3d 303, 307 (5th Cir. 2005); *Rodriguez-Castro v. Gonzales*, 427 F.3d 316, 320 (5th Cir. 2005); *Patel v. Ashcroft*, 401 F.3d 400, 409 (6th Cir. 2005); *Padilla v. Gonzales*, 397 F.3d 1016, 1019 (7th Cir. 2006); *United States v. Rodriguez*, 979 F.2d 138, 140-41 (8th Cir. 1992); *Cuevas-Gaspar v. Gonzales*, 430 F.3d 1013, 1017 (9th Cir. 2005); *United States v. Reyes-Castro*, 13 F.3d 377, 379 (10th Cir. 1993); *Vuksanovic v. United States AG*, 439 F.3d 1308, 1311 (11th Cir. 2006). Of course, differences exist in the mode and method of its implementation, but adherence to the broad conceptual framework is nearly universal.

criterion."[3] *Omari v. Gonzales*, 419 F.3d 303, 308 (5th Cir. 2005).

In making this determination, the circuit courts are not allowed to retry the original case, but they are permitted to consult a narrow range of select documents: the record of conviction, the charging document, jury instructions, and (in plea cases such as Petitioner's), the "written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented." *Shepard*, 544 U.S. at 16. Of note, the government argued in *Shepard* that reviewing courts should be able to rest their holdings on "police reports or complaint applications" – in effect asking for an easing of *Taylor's* strict rules. *Id.* at 16, 23. This Court, though, rejected the government's contention and refused to allow reviewing courts to go "beyond conclusive

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[3] In most circuits, inquiry into divisible subsections for the purpose of determining whether the alien's prior conviction falls within a given statutory definition is conducted under the rubric of a "modified categorical approach." *See, e.g., Larin-Ulloa v. Gonzales*, 462 F.3d 456, 464 (5th Cir. 2006) ("If the statute of conviction defines multiple offenses, at least one of which does not describe an aggravated felony, we apply a modified categorical approach . . . to determine whether the conviction was 'necessarily' for a particular crime defined by the statute that meets the aggravated felony criterion"); *Dickson v. Ashcroft*, 346 F.3d 44, 48-49 (2nd Cir. 2003) ("In reviewing a conviction under a divisible statute, the categorical approach permits reference to the record of conviction for the limited purpose of determining whether the alien's conviction was under the branch of the statute that permits removal").

records made or used in adjudicating guilt." *Id.* at 21. To allow "documents submitted to lower courts even prior to charges," *see id.*, would frustrate the evidentiary and pragmatic defenses erected by *Taylor*. *See id.* at 23 & n.4.

In short, the categorical approach restricts reviewing courts' inquiries to "the elements and the nature of the offense of conviction, rather than to the particular facts relating to petitioner's crime." *Leocal v. Ashcroft*, 543 U.S. 1, 7 (2004). Inquiry beyond the statutory language is only permitted when the statute is overbroad or divisible, at which point *Shepard* and *Taylor* "allow a peek at the indictment and equivalent documents to see which component of the state offense the conviction entails." *Abdelqadar*, 413 F.3d at 672. As the Seventh Circuit noted, "[t]he goal is to determine what the accused was convicted of, not what he did in fact, so the scope of inquiry is correspondingly limited." *United States v. Lewis,* 405 F.3d 511, 515 (7th Cir. 2005).

Thus, the IJ, BIA and Fifth Circuit were required to address *only* the statutory language and the documents approved of by this Court. A holding based on any other inquiry is invalid as *ultra vires*. If Petitioner's predicate conviction did not "'necessarily' involve[ ]" the constituent elements of a CIMT, the lower courts' rulings must be reversed. *Shepard*, 544 U.S. at 24. In Petitioner's case, however, the lower courts based their holding precisely on the documents rejected in *Shepard*. Such a gross misapplication of the law cannot withstand scrutiny by this Court.

3. Uniform Application of the Categorical Approach Protects Against Evidentiary, Pragmatic and Constitutional Concerns; Material Deviations Therefrom Should Not Be Tolerated By This Court.

The categorical approach exists so as to insulate federal courts from evidentiary, pragmatic, and constitutional concerns. Judicial rulings based on an inappropriate application of the categorical approach are not deserving of respect and should be reversed.

First, evidentiary concerns arise when immigration courts (including the BIA) are permitted to look beyond the statutory language. For example, immigration tribunals may be called upon to rule on the admissibility of evidence in the criminal context. Furthermore, they would be compelled to engage in their own factfinding, which might place the alien at a disadvantage. Often, evidence available at the trial level may be missing in the immigration courts, which can obviously lead to potential inequities. *See Taylor*, 495 U.S. at 601-02 ("an elaborate factfinding process regarding the defendant's prior offenses would be impracticable and unfair"); *Shepard*, 544 U.S. at 20 (writing that courts should avoid "subsequent evidentiary enquiries into the factual basis for the earlier conviction"). In sum, if the alien is precluded to exculpate, the Government should be precluded to inculpate.

Second, judicial inquiry into the underlying facts wastes scarce government resources. When faced

with the possible shortcomings of a second round of factfinding, one cannot justify the expense of time, money and other resources in duplicating the efforts of the criminal courts. This Court has noted that an inquiry restricted to the statutory language represents a "pragmatic conclusion about the best way" to avoid superfluous judicial proceedings. *Id.*

Finally, uniform application of the categorical approach preserves an alien's constitutional rights. Due Process is protected when courts are forbidden from engaging in factfinding unrestrained by the burdens of proof imposed in previous hearings or trials. Equal Protection is not offended because aliens receive similar treatment no matter their jurisdiction. *Compare Chang v. INS*, 307 F.3d 1185, 1189-92 (9th Cir. 2002) (applying both the categorical and modified categorical approaches) *with United States v. McGill*, 450 F.3d 1276 (11th Cir. 2006) (failing to apply either approach).[4]

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[4] Moreover, in sentencing enhancement cases, failure to adhere to the categorical approach can quickly lead to a violation of the convicted's Sixth Amendment rights, i.e., reviewing courts might take it upon themselves to decide facts unproven before a jury or other factfinder. *See Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000); *see also Taylor*, 495 U.S. at 601 ("If the sentencing court were to conclude, from its own review of the record, that the defendant actually committed a generic burglary, could the defendant challenge this conclusion as abridging his right to a jury trial?"). Because immigration is a civil matter, Sixth Amendment concerns are not implicated in the instant case. Nevertheless, the *Apprendi* issues illustrate the need for uniform application in both criminal and civil contexts.

In the instant case, the Fifth Circuit's behavior violated each and every concern. The opinion duplicated – unsuccessfully – the efforts of the Texas State trial judge. It accepted, as evidence, an unsupported affidavit on which its entire holding was based. It disregarded the trial court's specific findings of fact, and in so doing it ignored and degraded Petitioner's constitutional rights. Marked with so many failings, the Fifth Circuit opinion cannot withstand judicial scrutiny and must be reversed.

B. The Fifth Circuit Failed to Employ the (Modified) Categorical Approach By: (1) Finding that § 22.01(a) of the Texas Penal Code Was Divisible; (2) Consulting Extra-Judicial Documents and; (3) Basing Its Determination That Petitioner's Conviction Constituted a CIMT on the Underlying Circumstances Rather than the Explicit Statutory Language.

Petitioner's case required the IJ, BIA, and the Fifth Circuit to decide whether his conviction for assault under § 22.01(a) of the Texas Penal Code constituted a CIMT for federal immigration purposes. All three reviewing courts concluded that the assault fell within the accepted definition of a CIMT. *See* A.R. at 2, 63; *see also Calderon-Dominguez v. Mukasey*, Slip Copy, 2008 WL 64664, *1 (5th Cir., Jan. 7, 2008). However, the courts failed to base their conclusions on the categorical approach. The decisions cannot therefore be supported and should be reversed.

1. Simple Assault Is Not a CIMT Under the Prevailing Law.

The INA, despite using the term a number of times, contains no definition for "crimes against moral turpitude." *See Navarro-Lopez v. Gonzales*, 503 F.3d 1063, 1068 (9th Cir. 2007) ("there are no statutorily established elements for a crime involving moral turpitude"); *Smalley v. Ashcroft*, 354 F.3d 332, 335-36 (5th Cir. 2003) (noting that the INA's legislative history provides no "congressional intent" regarding the definition of a CIMT). However, there is "widespread judicial consistency" in applying an effectively uniform definition: "conduct that is inherently base, vile, or depraved, and contrary to the private and social duties man owes to his fellow men or to society in general."[5] *Navarro-Lopez*, 503 F.3d at 1068.

The BIA, echoing the common-law origin of the federal courts' definition, *see Mei v. Ashcroft*, 393 F.3d 737, 739 (7th Cir. 2004), has described the concept as follows:

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[5] *See, e.g.*, *Morales v. Gonzales*, 478 F.3d 972, 978 (9th Cir. 2007); *Sosa-Martinez v. United States AG*, 420 F.3d 1338, 1341-42 (11th Cir. 2005); *Padilla v. Gonzales*, 397 F.3d 1016, 1019 (7th Cir. 2005) (also asking whether the act involved arouses "serious" indignation in the law-abiding public); *Omagah v. Ashcroft*, 288 F.3d 254, 259-60 (5th Cir. 2002) (further adding that morally turpitudinous acts are "per se morally reprehensible and intrinsically wrong"); *Medina v. United States*, 259 F.3d 220, 227 (4th Cir. 2001) (adding that morally turpitudinous conduct "shocks the public conscience").

> Moral turpitude refers generally to conduct which is inherently base, vile, or depraved, and contrary to the accepted rules of morality and the duties owed between persons or to society in general. *See Matter of Danesh*, 19 I. & N. Dec. 669 (BIA 1988); *Matter of Flores*, 17 I. & N. Dec. 225, 227 (BIA 1980). Moral turpitude has been defined as an act which is per se morally reprehensible and intrinsically wrong, or malum in se, so it is the nature of the act itself and not the statutory prohibition of it which renders a crime one of moral turpitude. *Matter of P-*, 6 I. & N. Dec. 795 (BIA 1955).

See Matter of Fualaau, 21 I. & N. Dec. 475, 477 (BIA 1996); *see also Matter of Solon*, 24 I. & N. Dec. 239, 240 (BIA 2007) (writing that CIMTs incorporate "conduct that shocks the public conscience as being inherently base, vile, or depraved, and contrary to the accepted rules of morality and the duties owed between persons or to society in general.") (internal citations omitted); *Matter of Franklin*, 20 I. & N. Dec. 867, 868 (BIA 1994), *aff'd*, 72 F.3d 571 (8th Cir. 1995); *Matter of Perez-Contreras*, 20 I. & N. Dec. 615 (BIA 1992); *Matter of Short*, 20 I. & N. Dec. 136, 137 (BIA 1989).

Importantly, simple assaults, i.e., those offenses lacking any aggravating factors, are not CIMTs. *See Fernandez-Ruiz v. Gonzales*, 468 F.3d 1159, 1165 (9th Cir. 2006); *Reyes-Morales v. Gonzales*, 435 F.3d 937, 945 & n.6 (8th Cir. 2006) (observing that simple assault does not involve moral turpitude); *Knapik v. Ashcroft*, 384 F.3d 84, 90 (3rd Cir. 2004) (same);

United States ex rel. Zaffarano v. Corsi, 63 F.2d 757, 759 (2d Cir. 1933) (same); *see also Matter of Fualaau*, 21 I. & N. Dec. at 477 ("Simple assault is not considered to be a crime involving moral turpitude"); *Matter of Perez-Contreras*, 20 I. & N. Dec. 615 (BIA 1992) (assault in the third degree, which resulted only in bodily injury, held not to be a CIMT); *Matter of Short*, 20 I. & N. Dec. at 139; *Matter of Baker*, 15 I. & N. Dec. 50, 51 (BIA 1974). However, conviction under assault statutes *necessitating* the commission of aggravating factors may constitute CIMTs. *See, e.g.*, *Matter of Danesh*, 19 I. & N. Dec. 669, 670 (BIA 1988) (assault upon a peace officer held to be a CIMT); *Matter of Medina*, 15 I. & N. 611 (BIA 1976), *aff'd sub nom. Medina-Luna v. INS*, 547 F.2d 1171 (7th Cir. 1977) (assault with a deadly weapon held to be a CIMT).

Thus, general assault statutes that do not *require* serious bodily injury, death, use of a deadly weapon, or other aggravating factors are not, as a matter of law, CIMTs.

2. A Correct Reading of § 22.01(a) of the Texas Penal Code, Using The Categorical Approach, Yields a Statute Whose Constituent Subsections Do Not Facially Constitute CIMTs; The Fifth Circuit's Divisibility Analysis Should Be Reversed.

Section 22.01(a) of the Texas Penal Code, taken as a whole, is not a CIMT. The *Shepard* and *Taylor*

categorical approach, clearly applicable in this setting, requires courts to first examine whether conviction under the predicate statute necessarily involves every element satisfying the definition of a CIMT. If a court can answer affirmatively, the offense constitutes a CIMT.

Here, however, the statute permits conviction for acts not inherently base or vile. *See* TEX. PENAL CODE ANN. § 22.01(a)(3) (allowing conviction for merely "offensive" contact). Generally speaking, "if a statute encompasses both acts that do and do not involve moral turpitude, a finding of moral turpitude cannot be sustained." *Pichardo v. INS*, 104 F.3d 756, 760 (5th Cir. 1997) (*citing Hamdan v. INS*, 98 F.3d 183, 187 (5th Cir. 1996)).

Petitioner was not convicted under any particular subsection of § 22.01(a). Thus, at the most general level, his conviction does not constitute a CIMT, and any finding otherwise must come through a divisibility analysis conducted under the modified categorical approach.

3. Even Assuming Divisibility Analysis Is Necessary Under the Modified Categorical Approach, the Fifth Circuit Failed to Adhere to the Strictures of *Shepard* and *Taylor*.

Even under the divisibility analysis sanctioned by *Shepard* and *Taylor*, § 22.01(a)(1) of the Texas

Penal Code[6] does not, on its face, admit to being a CIMT. One only reaches the second step in *Taylor* and *Shepard* if the criminal statute is over-inclusive, i.e., some subsections admit, on their face, to falling within the prohibited conduct. If none of the subsections qualify, facially, for inclusion in the prohibited category – CIMT in the instant case – courts have no basis on which to conduct an inquiry into extra-judicial documents.

Section 22.01(a)(1) does not, a priori, require an assault upon a family member or a spouse for a valid conviction; it merely permits such actions. *See Garcia-Maldonado v. Gonzales*, 491 F.3d 284, 291 (5th Cir. 2007) ("If the statute can be violated by conduct that does not involve moral turpitude, then the offense is not a crime involving moral turpitude for immigration purposes."). One could violate § 22.01(a)(1) by assaulting a neighbor, without causing serious bodily injury and without use of a deadly weapon Thus, if § 22.01(a)(1) is not further divisible, conviction under it can in no wise constitute a CIMT.

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[6] Because one can only reasonably levy a charge that Petitioner's conviction constitutes a CIMT under § 22.01(a)(1), Petitioner assumes that only this subsection is under consideration. Indeed, the Fifth Circuit affirmed the I.J.'s (erroneous) finding that Petitioner plead guilty to assault under § 22.01(a)(1). *See Calderon-Dominguez*, 2008 WL 64664 at *1.

The Fifth Circuit, though, believed that § 22.01(a)(1) was further divisible,[7] but Petitioner disagrees with respect to the application of the modified categorical approach. The language used in *Omari* buttresses Petitioner's argument, talking explicitly of "subsections," *see* 419 F.3d at 308, and reference to extraneous materials is predicated on satisfying "this purpose," *see id.*, i.e., discovering which *statutory subsection* should apply. *See also Smalley*, 354 F.3d at 336 (noting that divisibility analysis applies only to "discrete subsections," not, implicitly, elements grouped together under one discrete subheading).

The Fifth Circuit's approach does not withstand careful scrutiny. Should courts be free to pick and choose which elements comprise a new "subsection within a subsection," it would destroy the very notion of a "categorical" approach. *See Amouzadeh v. Winfrey*, 467 F.3d 451, 455 (5th Cir. 2006) (discussing the "orbit of the statute" as a whole, not as an amalgamation of selected elements); *Rodriguez-Castro*, 427 F.3d at 320 (requiring courts to read the statute at the minimum criminal conduct necessary to sustain a

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[7] The court recently stated, speaking of § 22.01(a)(1): "Moreover, the relevant subsection . . . is further divisible. . . . As such, we are entitled to consider evidence in the record of conviction bearing on the specific crime to which Calderon pleaded guilty, namely evidence that (1) Calderon choked the victim, which suggests an intentional act, and (2) the victim was his spouse." *See Calderon-Dominguez*, 2008 WL 64664 at *1 & n.9.

conviction under the statute, implying that select elements may not be excised). Under the Fifth Circuit's logic in this case, any time a defendant plead guilty to a general assault charge under § 22.01(a)(1), a reviewing court could construe the plea, a priori, as an admission of spousal abuse. Facts, ascertained by inference and speculation, would be selectively applied to a "subsection" designed specifically to shoehorn a particular result into the legal framework outlined by this Court. Prior precedent, logic, reason, and fairness defy such judicial manipulation.

However, even assuming that § 22.01(a)(1) merits further divisibility analysis, the Fifth Circuit egregiously misapplied this Court's precedents. The modified categorical approach allows recourse to a narrow range of documents, *see supra*, for only one purpose: to determine what the alien "was convicted of, not what he did in fact." *Abdelqadar*, 413 F.3d at 672.

The Fifth Circuit found Petitioner removable based solely on its interpretations of the underlying facts. This course of action is, notably, forbidden. *See United States v. Calderon-Pena*, 383 F.3d 254, 257 (5th Cir. 2004) ("the elements of an offense of course come from the statute of conviction, not from the particular manner and means that attend a given violation of the statute") (internal citation omitted). The court accused Petitioner of intentionally choking

his wife,[8] despite an absolute dearth of relevant evidence in the conviction record. Yet, the statute under which Petitioner was convicted does not require the victim of the assault to be a family member, and much less his spouse.

It is well within the realm of possibility that a disinterested observer, reading § 22.01(a)(1), might conclude that Petitioner had been convicted of a simple assault occasioned upon a stranger, a co-worker, or a loose acquaintance. *See Gonzales*, 127 S. Ct. at 822 (requiring "more than the application of legal imagination to a state statute's language. It requires a realistic probability, not a theoretical possibility, that the State would apply its statute to conduct that falls outside the generic definition of a [CIMT]"). Certainly, under the controlling legal standards, simple assaults involving any of the above classes of persons, without more, would not constitute a CIMT. (And much less so any assault described in §§ 22.01(a)(2) and (3)). Thus, § 22.01(a)(1) is facially over-inclusive, allowing for convictions based on non-turpitudinous conduct, and the Fifth Circuit therefore had no legal authority to consult materials outside of the conviction record.

The Fifth Circuit's argument that Petitioner's conviction constitutes a CIMT hinges on the identity of his putative victim. Although not stated in its opinion, one can assume that the Fifth Circuit would

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[8] *See Calderon-Dominguez*, 2008 WL 64664 at *1 & n.9.

not view a simple assault upon a stranger or acquaintance, without any other aggravating factor, as a CIMT. The assault of one's spouse, however, is a different story. Conviction under a statute whose elements require the infliction of bodily injury on one's spouse is usually held to be a CIMT. *See Matter of Tran*, 21 I. & N. Dec. 291 (BIA 1996).

Petitioner's case, though, presents a fundamental difference from that presented in *Matter of Tran*. The latter case addressed a conviction under § 273.5(a) of the California Penal Code, which provides that "corporal injury resulting in a traumatic condition" on "his or her spouse" constitutes a felony. *Matter of Tran*, 21 I. & N. Dec. at 292. Conviction under § 22.01(a)(1) does not require the state to prove an assault resulting in injury to one's spouse.

And, even if the statute is construed as being divisible, i.e., addressing spousal and non-spousal assaults, the judicial and conviction records present clear, unequivocal, and affirmative evidence: *no domestic violence occurred* as a result of Petitioner's offense. *See* A.R. at 104. In Texas, state trial judges are required to make affirmative findings of fact related to family violence. TEX. CODE OF CRIM. PROC. Art. 42.013. Family violence is defined as "an act by a member of a family or household against another member of the family or household that is intended to result in physical harm, bodily injury, assault, or sexual assault or that is a threat that reasonably places the member in fear of imminent physical

harm, bodily injury, assault, or sexual assault." TEX. FAMILY CODE § 71.0004.

Furthermore, plea agreements carry great weight. *See Shepard*, 544 U.S. at 25. In this case, Petitioner pleaded only to a generic Class A misdemeanor under § 22.01(a).[9] A.R. at 104. Any further inference regarding the mode and manner of assault, as well as the Petitioner's mens rea, remains unsupported.

Despite the trial judge's *explicit* finding that no family violence occurred, and despite the generic crime to which Petitioner plead, the Fifth Circuit engaged in its own fact-finding and declared Petitioner guilty of intentionally choking his wife. *See Calderon-Dominguez*, 2008 WL 64664 at *1. The court relied entirely on an unproven affidavit within which Petitioner was accused of assaulting his wife.[10]

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[9] Moreover, Texas caselaw reveals that Texas treats a guilty plea as an admission of *only those facts* needed to support the conviction. *See, e.g., Carroll v. State*, 975 S.W.2d 630, 631-32 (Tex. Crim. App. 1998) ("[W]here a defendant pleads guilty to a felony charge before a jury or judge, [he] admits the existence of all facts necessary to establish guilt. . . ."); *Brinson v. State*, 570 S.W.2d 937, 938 (Tex. Crim. App. 1978) ("It is well established that a plea of guilty before a jury admits all the elements of the offense."). Thus, Petitioner's guilty plea cannot be construed as an admission of domestic violence.

[10] The affidavit of one Sonia Luna alleges that Petitioner committed a crime of violence against his spouse, *see* A.R. at 102, but neither the statute under which Petitioner was convicted nor Petitioner's conviction necessitate a finding that Luna's affidavit must be believed. *See Omari*, 419 F.3d at 307.

(Continued on following page)

This unsubstantiated affidavit represents the only evidence regarding the mode and manner of assault.

However, that affidavit does not form part of the conviction record. The affidavit itself bears no indicia of consultation by the trial court. The affidavit at issue is neither a "charging document," a "written plea agreement," nor an "explicit factual finding by the trial judge" to which the defendant assented. *Shepard*, 544 U.S. at 16. Rather, it embodies bald assertions that, when unflinchingly taken as fact, breach Petitioner's right to Due Process. The affidavit was entered into evidence by the IJ, but the IJ cannot, without any justification, take an unsubstantiated affidavit and later transform it into a "charging instrument," despite the Fifth Circuit's affirmation. *See Calderon-Dominguez*, 2008 WL 64664 at *1. Faced with conflicting evidence, the circuit court should have given exclusive weight to the actual conviction record compiled by the state trial judge, including his factual findings and the contents of the plea agreement.

Petitioner pleads with this Court to recognize that, under the modified categorical approach approved of in *Taylor* and *Shepard*, unsubstantiated underlying facts and circumstances, which do not form a part of the conviction, cannot trump the trial judge's affirmative findings that make up the official

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Moreover, no evidence exists showing the validity of the affidavit was ever tested in criminal proceedings.

record of conviction. *See Omari*, 419 F.3d at 308 (holding that documents not sufficiently conclusive and reliable to establish the facts to which the alien actually pleaded guilty, "including police reports and complaint applications, may not be considered."). To permit the Fifth Circuit to find otherwise allows the court to run roughshod over the categorical approach.

By engaging in erroneous and illegal factfinding when determining whether Petitioner's conviction constituted a CIMT, the Fifth Circuit failed to adhere to the categorical approach outlined by this Court in *Taylor* and *Shepard*.[11] Inquiry into extra-judicial materials not approved of by this Court's caselaw merits no more respect that blatant speculation and

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[11] This statement is not meant to absolve the IJ from her duty to correctly apply the law, which she failed to do. The IJ conducted no categorical analysis of § 22.01(a). She failed to ask if the elements necessarily proven at trial constituted a CIMT for immigration purposes. Rather, she stated that Petitioner's "conviction involve[d] assault against a family member which resulted in injury." A.R. at 63. This terse statement, which represents the extent to which the IJ conducted a *Shepard* analysis, misses the mark. The courts' mandate does not allow them to ask if a conviction "involves" conduct that might constitute a CIMT; such a construction renders the categorical approach superfluous. Rather, the courts' powers of inquiry extend only to an analysis of the explicit statutory language. Because conviction under § 22.01(a)(1) does not require an assault upon one's spouse, the IJ – and the BIA, which summarily affirmed the IJ's ruling – should not have ruled that Petitioner's offense constituted a CIMT. The Fifth Circuit similarly erred in affirming the underlying proceedings without carefully applying this Court's caselaw.

unfounded inferences. The plain language of the statute must control. Underlying circumstances, no matter how repugnant they may seem to an outside observer, cannot justify such a gross deviation from established caselaw. As such, the Fifth Circuit's decision is *ultra vires* and should be reversed.[12]

II. Petitioner Remains Eligible to Seek a § 212(h) Waiver, Despite His Conviction for an Aggravated Felony, Because He Adjusted to Lawful Permanent Resident Status After His Original Admission and Entry to the United States.

In the event that this Court affirms the ruling below as to removability, Petitioner asserts that he remains eligible to seek a § 212(h) waiver, thus preserving his ability to seek relief.

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[12] With reversal of the Fifth Circuit's decision, neither of the two original charges of removability is left standing. With no legally sustainable deportable offense, Petitioner asks this Court to vacate his order of removal. *See Tokatly v. Ashcroft*, 371 F.3d 613, 620-21 (9th Cir. 2004) (holding that if "the government has not met its burden of proving that the conduct for which the petitioner was convicted constitutes a predicate offense, . . . the conviction may not be used as a basis for removal"); *Camacho-Marroquin v. INS*, 188 F.3d 649, 652 (5th Cir. 1999), *withdrawn on other grounds*, 222 F.3d 1040 (5th Cir. 2005) (noting that a determination that conviction was not a crime of violence necessitates that reviewing court vacate the removal order "for failing to allege a deportable offense").

Petitioner was admitted on or around April 23, 1973, *see* A.R. at 124, and he was adjusted to lawful permanent resident status on or around April 25, 1973. A.R. at 159. Importantly, his adjustment to LPR status occurred after his entry and admission to the United States.

It is uncontroverted that Petitioner's recent assault conviction does not constitute an aggravated felony under INA § 101(a)(43); 8 U.S.C. § 1101(a)(43). Crucially, only one subsection of the definition for "aggravated felony" subsumes Petitioner's assault conviction, yet that subsection – INA § 101(a)(43)(F); 8 U.S.C. § 1101(a)(43)(F) – requires the conviction to be a "crime of violence" as defined in 18 U.S.C. § 16. The Fifth Circuit recently ruled that convictions under § 22.01(a) of the Texas Penal Code are not, as a matter of law, "crime[s] of violence" under 18 U.S.C. § 16. *See United States v. Villegas-Hernandez*, 468 F.3d 874, 882 (5th Cir. 2006). Thus, Petitioner's 1999 conviction may not disqualify him from seeking a § 212(h) waiver.

Petitioner's 1990 conviction for conspiracy to possess with intent to distribute marijuana, however, is an aggravated felony under INA § 101(a)(43)(B), (U); 8 U.S.C. § 1101(a)(43)(B), (U). Yet, when determining eligibility for a discretionary waiver under INA § 212(h); 8 U.S.C. § 1182(h), not all aggravated felonies are alike, and further, he does not need a waiver for the drug offense because he had already been granted such relief under INA § 212(c), 8 U.S.C. § 1182(c) (now repealed).

The operative statute states: "No waiver shall be granted under this subsection in the case of an alien who has previously been admitted to the United States as an alien lawfully admitted for permanent residence if either since the date of such admission the alien has been convicted of an aggravated felony." INA § 212(h); 8 U.S.C. § 1182(h). Thus, § 212(h), on its face, applies only to a subset of aliens, namely, those aliens admitted in the first instance as lawful permanent residents. *See Martinez v. Mukasey*, ___ F.3d ___, 2008 WL 642565, (5th Cir., Mar. 11, 2008) (holding that an alien, adjusted to LPR status after his original admission, was not barred from seeking a § 212(h) waiver despite having committed an aggravated felony) (decided after the Fifth Circuit's denial of Petitioner's motion for en banc hearing). An alien is rendered ineligible to seek a § 212(h) waiver only if he has committed an aggravated felony *after being admitted as an LPR*. The statute admits to no other reading. *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987) (noting this Court's long-standing principle "of construing any lingering ambiguities in deportation statutes in favor of the alien") (internal citations omitted).

Because Petitioner was admitted prior to his adjustment to LPR status, his 1990 aggravated felony does not, a priori, bar him from seeking a § 212(h) waiver. The IJ, BIA, and Fifth Circuit misinterpreted this matter and, in keeping with this Court's long-standing policy regarding lenity in removal cases, the determinations made below must be reversed. *See*

Fong Haw Tan v. Phelan, 333 U.S. 6, 10 (1948) ("We will not assume that Congress meant to trench on [the alien's] freedom beyond that which is required by the narrowest of several possible meanings of the words used."). Thus, Petitioner prays that this Court issue a writ of certiorari to rectify the unjust and erroneous ruling below.

CONCLUSION

This petition presents no circuit split; it presents no ambiguous terms needing definition. Rather, it presents a situation wherein the Fifth Circuit clearly misapplied the law and this Court's precedents. Petitioner seeks only to ensure that this nation's immigration laws are uniformly applied such that all persons' constitutional rights are protected. The opinion below, clearly erroneous as a matter of law, fails to comport with the Fifth Circuit's own caselaw, that of its sister circuits, and, most importantly, the patently unambiguous guidelines issued by this Court. So as to protect the Constitution and laws of the United States, Petitioner's residence of nearly forty years in the United States, and his family and his community ties, Petitioner prays that this Court issue a writ of certiorari and vacate the judgment of

the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 06-60198

JUAN CARLOS CALDERON-DOMINGUEZ,
also known as, Carlos Calderon

Petitioner

v.

MICHAEL B MUKASEY,
US ATTORNEY GENERAL

Respondent

Petition for Review of an Order of
the Board of Immigration Appeals
BIA No. A34 349 186

(Filed Jan. 7, 2008)

Before JONES, Chief Judge, and WIENER and CLEMENT, Circuit Judges.

PER CURIAM:*

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

Petitioner Juan Carlos Calderon-Dominguez (Calderon) seeks review of the final order of the Board of Immigration Appeals (BIA) ordering his removal under § 237(a)(2)(A)(ii) of the Immigration and Nationality Act (INA), 8 U.S.C. § 1227(a)(2)(A)(ii), as an alien convicted of two crimes involving moral turpitude ("CIMTs") that did not spring from a single course of criminal misconduct, to wit: his 1990 aggravated-felony drug conviction and his 1999 assault conviction under Texas Penal Code § 22.01.[1] For the following reasons, we deny his petition.

Calderon first contends that his Texas assault conviction did not constitute a CIMT warranting his removal. He also asserts that the immigration judge (IJ) erred in concluding that he was ineligible for adjustment of status or cancellation of removal by virtue of his prior aggravated-felony drug conviction.

We review the order of the BIA; we will consider the underlying decision of the IJ only if it influenced the determination of the BIA.[2] In the present case, the BIA adopted the decision of the IJ, so we must

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[1] TEX. PENAL CODE ANN. § 22.01(a). A person commits an assault if he: "(1) intentionally, knowingly, or recklessly causes bodily injury to another, including [his] spouse; (2) intentionally or knowingly threatens another with imminent bodily injury, including [his] spouse; or (3) intentionally or knowingly causes physical contact with another when [he] knows or should reasonably believe that the other will regard the contact as offensive or provocative."

[2] *Ontunez-Tursios v. Ashcroft*, 303 F.3d 341, 348 (5th Cir. 2002).

review the IJ's decision.[3] "We must uphold the BIA's determination of what conduct constitutes moral turpitude for purposes of deportation if it is reasonable."[4]

We may "reach the merits of a criminal alien's petition for review if the petition raises constitutional claims or pure questions of law."[5] Whether Calderon's assault conviction constitutes a CIMT warranting his removal is a purely legal question; we therefore have jurisdiction to review this issue.[6] Further, we have jurisdiction to consider Calderon's legal challenge to the denial of his application for adjustment of status.[7]

Considering the record as a whole, the IJ did not err in finding that Calderon pleaded guilty to violating § 22.01(a)(1) and that such an offense constitutes a CIMT. The charging instrument stated that Calderon "intentionally, knowingly, and recklessly cause[d] bodily injury to: Maricruz Calderon, by choking the said Maricruz Calderon." It further provided that Maricruz Calderon was Calderon's

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[3] *See Mikhael v. I.N.S.*, 115 F.3d 299, 302 (5th Cir. 1997).

[4] *Hamdan v. I.N.S.*, 98 F.3d 183, 185 (5th Cir. 1996).

[5] *Andrade v. Gonzales*, 459 F.3d 538, 542 (5th Cir. 2006), *cert. denied*, 127 S.Ct. 973 (2007).

[6] *See* 8 U.S.C. § 1252(a)(2)(D); *Rodriguez-Castro v. Gonzales*, 427 F.3d 316, 319 (5th Cir. 2005).

[7] *See Guerra-Moya v. Winfrey*, 170 F. App'x 358, 360 (5th Cir. 2006); *see also Bravo v. Ashcroft*, 341 F.3d 590, 592-93 (5th Cir. 2003).

wife.[8] Significantly, the language of the charging instrument tracked the statutory language of § 22.01(a)(1). Moreover, Calderon was convicted of a Class A misdemeanor, and only a conviction under § 22.01(a)(1) could give rise to a Class A misdemeanor in the instant case. A conviction under § 22.01(a)(2) is not a Class A misdemeanor, and a conviction under § 22.01(a)(3) typically is a Class C misdemeanor. A conviction under § 22.01(a)(3) may be elevated to a Class A misdemeanor under specified circumstances; however, the requisite aggravating factor, that the assault be committed against an elderly or disabled person, was lacking. As such, it is apparent that Calderon pleaded guilty to violating § 22.01(a)(1). More specifically, though, the record of conviction – namely the allegation in the charging instrument that Calderon choked Maricruz Calderon – supports a finding that Calderon pleaded guilty to *intentionally* assaulting his spouse.[9] Thus, the BIA's determination

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[8] The Conditions of Supervision portion of Calderon's judgment also reveals that his spouse was the victim of his assault, as Calderon was ordered to participate in a Domestic Violence Treatment Program.

[9] During oral argument, the government suggested that we were limited to considering only the legal allegations included in the charging instrument. We believe this statement was made in error. We have recognized on numerous occasions that "a charging instrument may appropriately be referenced in order to determine which of several statutorily specified or referenced methods of committing an offense (or statutory subdivisions containing different offense definitions or elements) are involved in a given case." *United States v. Villegas-Hernandez*, 468 F.3d 874, 883 (5th Cir. 2006). *See also Omari v. Gonzales*, 419 F.3d

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that Calderon's assault conviction constituted a CIMT was reasonable.[10] As the record established that Calderon was convicted of two CIMTs that were not part of the same scheme, the IJ properly ruled Calderon deportable under § 237(a)(2)(A)(ii) of the INA, 8 U.S.C. § 1227(a)(2)(A)(ii).

We also reject Calderon's argument that the IJ erred in concluding that he was ineligible for adjustment of status or cancellation of removal by virtue of his prior aggravated-felony drug conviction. Notwithstanding the fact that Calderon's 1990 drug

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303, 308-09 (5th Cir. 2005) (considering the factual allegations in the indictment in determining the subsection of the statute to which the defendant pleaded guilty); *United States v. Calderon-Pena*, 383 F.3d 254, 258 (5th Cir. 2004) (looking to the indictment "*for the limited purpose* of determining which of a series of disjunctive elements a defendant's conviction satisfies" (emphasis in original) (internal quotations omitted)); *United States v. Landeros-Gonzales*, 262 F.3d 424, 426 (5th Cir. 2001) (considering the defendant's criminal mischief indictment in determining the subsection of the statute to which he pleaded guilty). Here, the assault statute is divisible into three subsections. Moreover, the relevant subsection, § 22.01(a)(1), is further divisible, as it encompasses behavior that is intentional, knowing, and reckless. As such, we are entitled to consider evidence in the record of conviction bearing on the specific crime to which Calderon pleaded guilty, namely evidence that (1) Calderon choked the victim, which suggests an intentional act, and (2) the victim was his spouse.

[10] *See, e.g., In re Tran*, 21 I&N Dec. 291, 293-94 (BIA 1996); *In re Fualaau*, 21 I&N Dec. 475, 477-78 (BIA 1996); *Grageda v. I.N.S.*, 12 F.3d 919, 921-22 (9th Cir. 1993); *see also In re Perez-Contreras*, 20 I&N Dec. 615, 617-19 (BIA 1992); *Guerrero de Nodahl v. I.N.S.*, 407 F.2d 1405, 1406-07 (9th Cir. 1969).

conviction was previously waived under § 212(c) of the INA, 8 U.S.C. § 1182(c) (repealed), that offense remains viable as a factor to be considered for purposes of his eligibility for discretionary relief, and it continues to operate as an aggravated felony that statutorily precludes relief under § 212(h) of the INA, 8 U.S.C. § 1182(h).[11] Calderon's petition for review is DENIED.

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[11] *See In re Balderas*, 20 I&N Dec. 389, 391 (1991); *see also Molenda v. I.N.S.*, 998 F.2d 291, 294-95 (5th Cir. 1993).

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 06-60198

BIA Docket No. A34 349 186

JUAN CARLOS CALDERON-DOMINGUEZ,
also known as, Carlos Calderon

Petitioner

v.

MICHAEL B MUKASEY,
US ATTORNEY GENERAL

Respondent

Petition for Review of an Order of the
Board of Immigration Appeals

Before JONES, Chief Judge, and WIENER and CLEMENT, Circuit Judges.

JUDGMENT

(Filed Jan. 7, 2008)

This cause was considered on the petition of Mr. Juan Carlos Calderon-Dominguez for review of an order of the Board of Immigration Appeals and was argued by counsel.

It is ordered and adjudged that the petition for review is denied.

IT IS FURTHER ORDERED that petitioner pay to respondent the costs on appeal to be taxed by the Clerk of this Court.

ISSUED AS MANDATE: MAR 5 2008

A True Copy
Attest

Clerk, U.S. Court of Appeals,
Fifth Circuit

By: /s/ [Illegible]
Deputy MAR 5 2008

New Orleans, Louisiana

U.S. Department of Justice
Executive Office for
Immigration Review

Falls Church, Virginia 22041

Decision of the Board
of Immigration Appeals

File: A34 349 186 – San Antonio Date: FEB 27 2006

In re: JUAN CARLOS CALDERON-DOMINGUEZ
a.k.a. Carlos Calderon

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF
OF RESPONDENT: Simon M. Azar-Farr, Esquire

ON BEHALF
OF DHS: Carmen A. Leal Assistant Chief Counsel

CHARGE:

Notice: Sec. 237(a)(2)(E)(i), I&N Act [8 U.S.C. § 1227(a)(2)(E)(i)] – Convicted of crime of domestic violence, stalking, or child abuse, neglect, or abandonment

Sec. 237(a)(2)(A)(ii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(ii)] – Convicted of two or more crimes involving moral turpitude

APPLICATION: Adjustment of status; cancellation of removal

ORDER:

PER CURIAM. We adopt and affirm the decision of the Immigration Judge. *See Matter of Burbano,* 20

I&N Dec. 872, 874 (BIA 1994) (noting that adoption or affirmance of a decision of an Immigration Judge, in whole or in part, is "simply a statement that the Board's conclusions upon review of the record coincide with those which the Immigration Judge articulated in his or her decision"). We note that the respondent conceded all of the factual allegations alleged in the Notice to Appear and conceded that he is removable for having been convicted of a crime of domestic violence (Tr. at 2). *See* 8 C.F.R. §§ 1240.10(c), (d). The Board will not consider on appeal issues that were conceded at the hearing. *Cf. Matter of Pichardo,* 21 I&N Dec. 330 (BIA 1996). The Immigration Judge correctly concluded that the respondent's drug conviction can support a charge of removability under section 237(a)(2)(A)(ii) of the Immigration and Nationality Act, 8 U.S.C. § 1227(a)(2)(A)(ii), despite his grant of a section 212(c) waiver in a prior proceeding. *See Matter of Balderas,* 20 I&N Dec. 389 (BIA 1991). That aggravated felony conviction renders the respondent ineligible for cancellation of removal and for the section 212(h) waiver required for adjustment of status. Accordingly, the appeal is dismissed.

/s/ [Illegible]
FOR THE BOARD

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 06-60198

JUAN CARLOS CALDERON-DOMINGUEZ,
also known as, Carlos Calderon

Petitioner

v.

MICHAEL B MUKASEY,
US ATTORNEY GENERAL

Respondent

Petition for Review of an Order of
the Board of Immigration Appeals

ON PETITION FOR REHEARING
AND REHEARING EN BANC

(Filed Feb. 26, 2008)

(Opinion January 7, 2008, 5 Cir., ___, ___ F.3d ___)

Before JONES, WIENER, and CLEMENT, Circuit Judges.

PER CURIAM:

(✓) The Petition for Rehearing is DENIED and no member of this panel nor judge in regular active

service on the court having requested that the court be polled on Rehearing En Banc, (FED. R. APP. P. and 5TH CIR. R. 35) the Petition for Rehearing En Banc is also DENIED.

( ) The Petition for Rehearing is DENIED and the court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor, (FED. R. APP. P. and 5TH CIR. R. 35) the Petition for Rehearing En Banc is also DENIED.

( ) A member of the court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service and not disqualified not having voted in favor, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ [Illegible]
United States Circuit Judge

CLERK'S NOTE:
SEE FRAP AND LOCAL RULES 41 FOR STAY OF THE MANDATE.

100

(2)

No. 07-1337

FILED
JUL 23 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In the Supreme Court of the United States

JUAN CARLOS CALDERON-DOMINGUEZ, PETITIONER

v.

MICHAEL B. MUKASEY, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

GREGORY G. GARRE
Acting Solicitor General
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QUESTIONS PRESENTED

1. Whether the Immigration Judge properly relied on a charging document to establish that petitioner's state-law assault conviction included the elements making it a crime involving moral turpitude.

2. Whether petitioner is barred from seeking a waiver of inadmissibility under Section 212(h) of the Immigration and Nationality Act, 8 U.S.C. 1182(h), because he concededly has been convicted of an aggravated felony.

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In the Supreme Court of the United States

No. 07-1337

JUAN CARLOS CALDERON-DOMINGUEZ, PETITIONER

v.

MICHAEL B. MUKASEY, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-6) is not published in the *Federal Reporter*, but is reprinted in 261 Fed. Appx. 671.

JURISDICTION

The judgment of the court of appeals was entered on January 7, 2008. A petition for rehearing was denied on February 26, 2008 (Pet. App. 11-12). The petition for a writ of certiorari was filed on April 21, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner, a Mexican native and citizen, was admitted to the United States as a permanent resident

alien in April 1973. App., *infra*, 2a. He has since been convicted of a number of state and federal crimes.

In 1990, petitioner was convicted in federal district court of conspiracy to possess marijuana with intent to distribute, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(B). App., *infra*, 3a-4a; A.R. 124, 132-136. Although that offense rendered him deportable, in 1993 an immigration judge granted petitioner a waiver of deportability under former Section 212(c) of the Immigration and Nationality Act (INA), 8 U.S.C. 1182(c) (1994). App., *infra*, 4a; A.R. 113, 122.[1]

In 1999, petitioner was charged by information in Texas state court with one count of assault, in violation of Tex. Penal Code Ann. § 22.01(a) (Vernon 2003).[2] App., *infra*, 2a-3a; A.R. 102-110. The information alleged that petitioner had intentionally, knowingly, and recklessly caused bodily injury to his spouse, Maricruz Calderon, by choking her. App., *infra*, 2a-3a. Petitioner entered a plea of guilty, and the court imposed a fine and a suspended prison sentence. *Id.* at 3a; Pet. App. 3.

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[1] Section 212(c) has since been repealed. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, § 304(b), 110 Stat. 3009-597.

[2] Under this provision, a person commits an assault if the person:
(1) intentionally, knowingly, or recklessly causes bodily injury to another, including the person's spouse;
(2) intentionally or knowingly threatens another with imminent bodily injury, including the person's spouse; or
(3) intentionally or knowingly causes physical contact with another when the person knows or should reasonably believe that the other will regard the contact as offensive or provocative.
At the time, a first violation of subsection (a)(1) was a misdemeanor unless the victim was a public servant discharging an official duty. See Tex. Penal Code Ann. § 22.01(b) (Vernon Supp. 1998).

2. Federal immigration officials served petitioner with a Notice to Appear, charging that he was removable from the United States on two grounds. A.R. 158-167. First, the Notice alleged that petitioner's convictions were for "two or more crimes involving moral turpitude" (CIMT). See INA § 237(a)(2)(A)(ii), 8 U.S.C. 1227(a)(2)(A)(ii). Second, the Notice alleged that petitioner's conviction for assaulting his wife was a "crime of domestic violence." See INA § 237(a)(2)(E)(i), 8 U.S.C. 1227(a)(2)(E)(i) (defining "crime of domestic violence" to include "any crime of violence (as defined in section 16 of title 18) against a person committed by a current or former spouse of the person"). Petitioner admitted the factual allegations contained in the Notice to Appear and conceded his removability for committing a crime of domestic violence, but he denied that his past crimes involved moral turpitude. App., *infra*, 2a.

The Immigration Judge (IJ) found petitioner removable as charged. App., *infra*, 3a. First, she determined that petitioner was removable under Section 237(a)(2)(E)(i) because his 1999 assault conviction was a crime of domestic violence, inasmuch as the record evidence "clearly show[ed] that [he] assaulted his spouse." *Ibid.* Second, she found that both the assault conviction and the 1990 drug conviction were crimes involving moral turpitude. *Id.* at 3a-4a. Her conclusion with respect to the assault conviction rested on the fact that the crime "involve[d] an assault against a family member [that] resulted in injury." *Id.* at 3a.

Petitioner sought re-adjustment of his status to that of lawful permanent resident, pursuant to Section 245 of the INA, 8 U.S.C. 1255. The immigration judge found that petitioner was ineligible because his prior convictions made him inadmissible. See App., *infra*, 5a; INA

§ 245(a)(2), 8 U.S.C. 1255(a)(2). The immigration judge further concluded that petitioner could not seek a discretionary waiver of that inadmissibility pursuant to Section 212(h) of the INA because his drug conviction was an aggravated felony. See App., *infra*, 4a-5a; INA § 212(h), 8 U.S.C. 1182(h); see also INA § 101(a)(43)(B) and (U), 8 U.S.C. 1101(a)(43)(B) and (U) (conspiracy to commit illicit trafficking in a controlled substance is an aggravated felony).

The IJ accordingly ordered petitioner removed to Mexico. App., *infra*, 5a.

3. The Board of Immigration Appeals (BIA) adopted and affirmed the decision of the IJ. Pet. App. 9-10. The BIA noted that petitioner conceded removability on the domestic-violence ground, and the BIA agreed that petitioner was removable on the moral-turpitude ground. *Id.* at 10.

4. The court of appeals denied a petition for review in an unpublished per curiam disposition. Pet. App. 1-6.

The court of appeals first agreed that petitioner's conviction for assaulting his wife was a crime involving moral turpitude. Pet. App. 3. The court noted that the charging instrument stated that petitioner choked Maricruz Calderon and that she was petitioner's wife, permitting a finding that petitioner pleaded guilty to intentionally assaulting his spouse. *Id.* at 3-4; see also *id.* at 4 n.8 ("The Conditions of Supervision portion of Calderon's judgment also reveals that his spouse was the victim of his assault, as Calderon was ordered to participate in a Domestic Violence Treatment Program."). Under the BIA's precedent, which the court of appeals upheld as reasonable, an intentional assault on a close family member is a crime involving moral turpitude. *Id.* at 4-5 & n.10. The same is true of drug distri-

bution. Thus, the record established that petitioner had been convicted of two crimes involving moral turpitude that were not part of the same scheme, and he therefore was properly removable. *Id.* at 5.

The court also confirmed that petitioner's drug conviction was an aggravated felony that continued to bar him from the discretionary relief he sought. Pet. App. 5-6. The fact that an IJ had previously waived deportation based on that conviction was irrelevant, the court held. See *ibid.*

ARGUMENT

Petitioner expressly confirms (Pet. 30) that "[t]his petition presents no circuit split," and that he seeks only error correction. Because the court of appeals did not err, and because petitioner's contentions are wholly fact-bound in any event, no further review is warranted.

1. Petitioner does not disagree that a crime involving intentional assault on a spouse involves moral turpitude.[1] Rather, he principally contends that in determining that he committed such a crime, the IJ and the court of appeals misapplied the "categorical approach" set out in this Court's decisions in *Shepard* v. *United States*, 544 U.S. 13 (2005), and *Taylor* v. *United States*, 495 U.S. 575 (1990). Petitioner's argument substantially depends upon the notion that the IJ relied on "extraneous documents, not forming part of the official conviction re-

[1] Petitioner does not separately address the alternative ground for removal, *i.e.*, that he committed a crime of domestic violence, which he conceded at the hearing. See Pet. App. 10. Rather, he appears to assume that the latter ground for removal can be attacked on the same basis. See Pet. 27 n.12. That assumption is incorrect. See, *e.g.*, note 5, *infra*. Accordingly, even if petitioner could successfully attack one of the two alternative grounds for removal, the other would remain fully effective.

cord," to establish that his crime involved moral turpitude. Pet. 5; accord Pet. 7, 14, 21, 22, 24, 25, 26. That factual assertion is simply inaccurate.

The IJ was clear and unequivocal: she relied only on the information charging petitioner with assault. App., *infra*, 3a ("The Information attached to the Judgment of Conviction * * * clearly shows that [petitioner] assaulted his spouse."). The information is the charging document, used in place of an indictment, in Texas misdemeanor cases. See Tex. Code Crim. Proc. Ann. art. 21.20 (Vernon 1989).[1]

Reliance on a charging document is entirely proper even under the modified categorical approach set out in *Shepard* and *Taylor*. Under that approach, a court looks first at whether a conviction under a particular statute must necessarily meet the federal definition (*e.g.*, of "violent felony") because all of the conduct criminalized by that statute is within the federal definition. If the statute of conviction sweeps more broadly, then the question becomes whether the particular defendant was convicted of a crime meeting the federal definition. In *Shepard*, this Court cautioned that only a limited set of judicial records and documents may be used in the latter inquiry. But this Court has *never* restricted the use of charging documents. Indeed, in *Shepard* the Court stated that "in any sort of case"—whether involving a bench trial, a jury trial, or a guilty plea—"the details of a * * * charging document would do." 544 U.S. at 20-

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[1] At the hearing, the IJ verified as much with petitioner's counsel:

Q. Exhibit number 2, on the assault conviction, consists of the information and starting with the second page is the [judgment] from the courts * * *.

A. Yes.

A.R. 78.

21; accord *id.* at 23 n.4 ("[A]ny enquiry beyond statute *and charging document* must be narrowly restricted to implement the object of the statute and avoid evidentiary disputes.") (emphasis added).[5] Thus, the court of appeals correctly applied the modified categorical approach to the charging document here.

Petitioner does not seriously dispute these legal principles. Rather, he presses the fact-bound assertion that the IJ and the court of appeals mischaracterized the document in question. Even if that contention were correct—and it is not—it would not warrant review.[6] Petitioner also contends (Pet. 20) that the modified categorical approach cannot be used to determine which of the alternative elements of the Texas assault statute petitioner violated, because some of those elements are not captioned as discrete subdivisions. That argument merely asserts that the Fifth Circuit misapplied its own precedent in reviewing Texas law, which is no basis for further review. In any event, the Fifth Circuit correctly explained that the Texas statute was sufficiently divisible that the IJ was "entitled to consider evidence in the

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[5] Even if the charging document were out of bounds, the court of appeals noted that in this case the *judgment* itself established that petitioner had committed a crime involving domestic violence. See Pet. App. 4 n.8. And because that fact alone makes petitioner removable under Section 237(a)(2)(E)(i), see App., *infra*, 3a, any dispute about whether the crime also involved moral turpitude is irrelevant to petitioner's removal.

[6] Petitioner also suggests (Pet. 23-21) that the absence of a finding of "family violence" from the record should be dispositive. That contention is incorrect under Texas law. *State* v. *Eakins*, 71 S.W.3d 443, 445 (Tex. App. 2002) ("The failure of the trial court * * * to affirmatively find that family violence was involved * * * does not necessarily mean that the court considered the issue and determined that family violence was *not* involved.").

record of conviction bearing on the specific crime to which [petitioner] pleaded guilty, namely evidence that (1) [petitioner] choked the victim, which suggests an intentional act, and (2) the victim was his spouse." Pet. App. 5 n.9.

An additional reason counseling against review is that the immigration laws do not mandate adoption of the categorical approach at all: although the court of appeals has used it to determine whether a crime involves moral turpitude, the BIA in the exercise of its administrative discretion has begun to acknowledge that IJs may consider evidence extrinsic to a conviction even in some instances that might not be consistent with the approach of *Shepard* and *Taylor*. See *Ali* v. *Mukasey*, 521 F.3d 737, 743 (7th Cir. 2008) (deferring to the BIA's determination that "when deciding how to classify convictions under criteria that go beyond the criminal charge—such as the amount of the victim's loss, or whether the crime is one of 'moral turpitude,' the agency has the discretion to consider evidence beyond the charging papers and judgment of conviction"). See also *Navarro-Lopez* v. *Gonzales*, 503 F.3d 1063, 1085 (9th Cir. 2007) (en banc) (Bea, J., dissenting) (stating that under this Court's precedent, "[t]he question whether a state crime qualifies as a 'crime involving moral turpitude' * * * cannot be answered * * * by turning to the categorical approach of [*Taylor*]"). Even if there were an alleged conflict over the application of the categorical approach to moral-turpitude crimes, the BIA may be able to resolve in the first instance the propriety of considering particular evidence in such cases.

2. Petitioner also urges (Pet. 27-30), for the first time on judicial review, that he was not in fact admitted to the United States as a lawful permanent resident and

that Section 212(h) therefore does not bar him from seeking a discretionary waiver of inadmissibility. See INA § 212(h), 8 U.S.C. 1182(h) (providing that "[n]o waiver shall be granted under this subsection in the case of an alien who has previously been admitted to the United States as an alien lawfully admitted for permanent residence" and who, "since the date of such admission[,] * * * has been convicted of an aggravated felony"). Petitioner never presented this contention to the court of appeals, and the court therefore did not consider it. Rather, petitioner contended below that the entirely different waiver he had received under former Section 212(c) obviated the need for a waiver under Section 212(h). See, *e.g.*, Pet. C.A. Br. 20 (conceding that "the Immigration Judge may be correct that Petitioner is ineligible for § 212(h) waiver due to an aggravated felony"); Pet. C.A. Reply Br. 15-18. He did not argue that he was eligible to seek (and was seeking) a Section 212(h) waiver. As the latter question was neither pressed in, nor passed upon by, the court of appeals, it does not warrant this Court's review.

Even if the question were properly presented and called for plenary review, the factual basis of petitioner's contention is inaccurate. Petitioner contends that "his adjustment to LPR status occurred [two days] after his entry and admission to the United States" in 1973. Pet. 28. The IJ found otherwise based on the administrative record. See App., *infra*, 3a ("[Petitioner] * * * was admitted as a permanent resident alien on April 25, 1973."). Although one document in the administrative record, the Notice to Appear served upon petitioner, did suggest that his status had been "adjusted," A.R. 159, that suggestion was apparently inaccurate, and indeed would have been legally impossible at the time. See

8 U.S.C. 1255(c) (1970) ("The provisions of this section [permitting adjustment of status] shall not be applicable to any alien who is a native of any country of the Western Hemisphere"), amended by Immigration and Nationality Act Amendments of 1976, Pub. L. No. 94-571, § 6, 90 Stat. 2705-2706.

Finally, the decision on which petitioner relies for the proposition that the IJ erred, *Martinez v. Mukasey*, 519 F.3d 532 (5th Cir. 2008), held that an alien whose status was adjusted to lawful permanent resident *ten years* after admission had unambiguously not been "admitted * * * as an alien lawfully admitted for permanent residence." *Id.* at 542, 544. Even if petitioner's factual allegations were correct, the brief two-day interval between his alleged entry and his alleged adjustment would present the question whether both events might be seen as occurring at the time of "admission." See *id.* at 544 (discussing the definition of "admission"). It would be premature to take up these questions without administrative factfinding and a reasoned BIA decision on the subject.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

GREGORY G. GARRE
Acting Solicitor General

GREGORY G. KATSAS
Assistant Attorney General

DONALD E. KEENER
ROBERT N. MARKLE
Attorneys

JULY 2008

APPENDIX

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT - SAN ANTONIO, TX

A34-349-186

IN THE MATTER OF JUAN CARLOS
CALDERON-DOMINGUEZ, RESPONDENT

IN REMOVAL PROCEEDINGS

CHARGE: Section 237(a)(2)(E)(i) of the INA-alien who, at any time after entry, has been convicted of a crime of domestic violence.

Section 237(a)(2)(A)(ii) of the INA-alien who, after admission, has been convicted of two or more crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct.

APPLICATION: ADJUSTMENT OF STATUS UNDER SECTION 245 OF THE INA; 212(h) WAIVER

IN BEHALF OF THE RESPONDENT:
Antonio Reyes-Vidal, Esq.

ON BEHALF OF THE DHS:
Carmen Leal
Assistant Chief Counsel

WRITTEN DECISION OF THE IMMIGRATION JUDGE

The Respondent is a married male alien, native and citizen of Mexico, who was admitted as a permanent resident alien on April 25, 1973. The Department of Homeland Security issued a Notice to Appear against the aforementioned Respondent alleging that the respondent was convicted on February 25, 1999 for the offense of Assault, a misdemeanor, in violation of the Texas Penal Code Section 22.01. In addition, the DHS has alleged that the Respondent was also convicted on February 18, 1980 for the offense of Involuntary [M]anslaughter in the District Court at Val Verde County, Texas. See Exhibit #1. The DHS lodged an additional allegation asserting that the Respondent was convicted on October 18, 1990 in the U.S. District Court, Middle District of North Carolina of Conspiracy to Possess with Intent to Distribute Marijuana. See Exhibit #4.

The DHS has charged the respondent with being subject to removal from the United States pursuant to Sections 237(a)(2)(E)(i) and Sections 237(a)(2)(A)(ii) of the INA.

The Respondent appeared before the Court and, through his attorney of record[,] admitted all of the allegations in the Notice to Appear, admitted the charge of removability under Section 237(a)(2)(E)(i), but denied the charge under Section 237(a)(2)(A)(ii). The respondent also admitted allegation #7 in Exhibit #1.

The government offered, and the Court received into evidence, Exhibit #2, the Information, Judgment and Sentence in Respondent's criminal case for Assault dated February 25, 1999. The Information established

that the Respondent intentionally, knowingly and recklessly caused bodily injury to Maricruz Calderon, his spouse, by choking her. For this offense, he was given a 30 day suspended sentence and a $500 fine. The government also offered, and the Court received into evidence, Exhibit #3. Exhibit #3, is the Indictment and Judgment of Conviction dated February 14, 1980 for the offense of Involuntary Manslaughter, a 3rd degree felony, for which the imposition of sentence was suspended and the Respondent was placed on probation for three years. The Indictment establishes that the Respondent "did then and there recklessly cause the death of an individual, Sylvia Athayde, while driving a motor vehicle."

The Information attached to the Judgment of Conviction, Exhibit #2, clearly shows that respondent assaulted his spouse. The Court finds the Respondent's conviction for assault against his wife to be a crime of domestic violence. Accordingly, because of Respondent's admissions and concessions, and more particularly, because of Exhibit #2, the Court finds that the charge of removability under Section 237(a)(2)(E)(i) has been established.

In reference to the charge of removability pursuant to Section 237(a)(2)(A)(ii), the Court FINDS that the Respondent's conviction for misdemeanor assault against his wife is a crime involving moral turpitude. Respondent's conviction involves an assault against a family member which resulted in injury. *See Matter of Tran*, 21 I&N Dec. 291, 294 (BIA 1996); *See, also, Matter of Fualaau*, 21 I&N Dec. 475 (BIA 1996); and *Matter of Perez-Contreras*, 20 I&N Dec. 415 (BIA 1992). Further, Respondent's 1990 conviction for Conspiracy to Possess with Intent to Distribute Marijuana is also a

crime involving moral turpitude. *See Matter of Khourn*, 21 I&N Dec. 1041 (BIA 1997). *See Matter of Frentescu*, 18 I&N Dec. 244 (BIA 1982). Therefore, the charge under Section 237(a)(2)(A)(ii) will also be sustained.

The Court finds that Respondent's conviction for Involuntary Manslaughter is not a conviction for a crime involving moral turpitude. *See Matter of Lopez*, 13 I&N Dec. 725 (BIA 1971).

The Court finds that the respondent was granted a waiver under Section 212(c) of the INA on October 18, 1990. (See Order Granting 212(c) Relief dated June 8, 1993 by Immigration Judge Brodsky in San Antonio, Texas) This waiver, under Section 212(c), waived Respondent's deportability under Sections 214(a)(2)(B)(i) and Sections 241(a)(2)(A)(iii) due to the Respondent's conviction for Conspiracy to Possess with Intent to Distribute Marijuana. Although Respondent was granted a waiver under Section 212(c), his prior conviction can be brought up in a second proceeding as one of two crimes involving moral turpitude. *See Matter of Balderas*, 20 I&N Dec. 389 (BIA 1991).

The Court finds that Respondent's conviction for [a] federal drug offense dated October 18, 1990 is an aggravated felony as defined in Section 101(a)(43)(U) as it relates to 101(a)(43)(B) of the INA.

Accordingly, after considering all the evidence of record, the Court finds that removability pursuant to Section 237(a)(2)(E)(i); and 237(a)(2)(A)(ii) have been established by clear and convincing evidence. *Woodby v. INS*, 385 U.S. 276, 87 S. Ct. 484, 17 L. Ed. 2d 362 (1966).

Since this Court has determined that the Respondent has been convicted of an aggravated felony pursuant to Section 101(a)(43)(U), as it relates to 101(a)(43)(B) of the INA, the Court determines that Respondent is not statutorily eligible for re-adjustment of status under Section 245 of the INA. *See* 212(h)(2) of the INA. Respondent is also ineligible for cancellation of removal pursuant to Section 240A(a) due to the prior grant of 212(c) relief. See 240A(c)(6) of the INA.

Accordingly, the following is the Order of the Court:

ORDER

IT IS HEREBY ORDERED THAT THE RESPONDENT IS HEREBY REMOVED FROM THE UNITED STATES TO MEXICO PURSUANT TO SECTIONS 237(a)(2)(E)(i); AND 237(a)(2)(A)(ii) OF THE INA.

Date: December 2, 2004 /s/ BERTHA A. ZUNIGA
BERTHA A. ZUNIGA
IMMIGRATION JUDGE

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(3)

No. 07-1337

Supreme Court, U.S.
FILED
AUG - 5 2008
OFFICE OF THE CLERK

In The

Supreme Court of the United States

JUAN CARLOS CALDERON-DOMINGUEZ,

Petitioner,

v.

MICHAEL B. MUKASEY,
UNITED STATES ATTORNEY GENERAL,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Petitioner Juan Carlos Calderon-Dominguez's petition presents to the Supreme Court an important question which determines whether aliens legally present in this country will be allowed to remain in this country, or will be banished for life: Whether the immigration agency and the lower courts are bound by the rules laid down by the United States Supreme Court, or whether judicial rulings based on the incorrect application of a clearly established Supreme Court rule will stand.

It is well known that the Supreme Court rarely grants certiorari for the purpose of correcting errors below, particularly in the case of unpublished opinions. However, this creates a significant loophole through which bad decisions can be applied to politically disfavored litigants with no possibility of review. Where the law is clear, and is clearly misapplied, this Court's involvement will be minimal, but the consequences for Petitioner and others similarly situated will be tremendous.

The law in this case is clearly established. This Court has established the "categorical approach" for determinations of whether a criminal conviction falls within a particular category of crime for the purpose of sentence enhancement. *Taylor v. United States*, 495 U.S. 575 (1990). This approach was elaborated on in *Shepard v. United States*, 544 U.S. 13 (2005), which described in more detail the sources of information a court could rely on to make such a determination.

The so-called *Taylor-Shepard* categorical approach has been applied to immigration proceedings for the purpose of determining whether a criminal conviction falls into a category of crimes which render an alien removable. *Gonzales v. Duenas-Alvarez*, 549 U.S. 183 (2007) ("In determining whether a conviction (say, a conviction for violating a state criminal law that forbids the taking of property without permission) falls within the scope of a listed offense (e.g., 'theft offense'), the lower courts uniformly have applied the approach this Court set forth in *Taylor*. . . .").

The law in this case was clearly misapplied. As explained more fully in Petitioner's Brief, the Fifth Circuit erred by failing to correctly apply the *Taylor-Shepard* categorical approach to Petitioner's case, finding that Petitioner pled guilty to a "crime involving moral turpitude" (CIMT) as defined under 8 U.S.C. § 1227(a)(2)(A)(i)(I) by looking to documents which fall outside the permissible range of documents the court can consult under *Shepard and Taylor* and relying on facts not necessary for the conviction and explicitly not found by the judge. This erroneous application of clearly established law will stand, and Petitioner will be removed from this country and nuclear American family destroyed, if this Court does not correct the Fifth Circuit's error.

1. Respondent argues that the court of appeals did not err, and thus no further review is warranted. Resp. Br. at 5. Respondent argues that under the rule announced in *Shepard*, "the details of a . . . charging

document" can be used by the court to determine if a crime meets the federal definition of CIMT for immigration purposes. 544 U.S. at 6.

Respondent misstates the law. Under Fifth Circuit precedent opinion, the charging document can be used for the limited purpose of determining the subsection of a statute to which the defendant pleaded guilt, if it is not otherwise clear from the conviction record. *United States v. Villegas-Hernandez*, 468 F.3d 874, 883 (5th Cir. 2006), *cert. denied*, 127 S. Ct. 1351 (2007); *Omari v. Gonzales*, 419 F.3d 303, 308-09 (5th Cir. 2005); *United States v. Calderon-Pena*, 383 F.3d 254, 258 (5th Cir. 2004), *cert. denied*, 543 U.S. 1076 (2005); *United States v. Landeros-Gonzales*, 262 F.3d 424, 426 (5th Cir. 2001).

It is not permissible to use the charging instrument to determine what, in fact, the defendant *did*, as a charging instrument is merely an accusation. The facts alleged in a charging document are not necessarily the same as those proven in a bench or jury trial, or pled to in a plea agreement; indeed, it is the difference between what is alleged and what can actually be proven which makes for all the drama of the courtroom. Thus when the allegations in a charging document are not necessary for the finding of guilt, the allegations in the charging document cannot be used as if they were proven fact. This is particularly the case when there is contradictory evidence regarding those allegations.

Here, for example, the charging document, Ms. Luna's affidavit, states that Petitioner's victim was his wife, Maricruz Calderon. (A.R. 108.) The specific elements of the crime to which Petitioner pled guilty did not require that the victim be a family member; the crime to which he pled was simple assault, not a domestic violence charge. Further, the court specifically found that the crime did *not* involve family violence. (A.R. 110.) Thus we have here an allegation (Petitioner's victim *was* a member of his family), a conviction record (Petitioner's victim could be anyone, including a member of his family), and a judicial finding of fact (Petitioner's victim was *not* a member of his family) – and the Immigration Judge must determine which conclusion applies. It is common sense that a bare allegation should not trump a judicial finding of fact. And of course the law states that it must be so: the charging document is not a source of *facts*. It is to be used to determine *only* which subsection of a crime must have been the one the defendant had been charged with violating. *Villegas-Hernandez*, 468 F.3d at 883; *Omari,* 419 F.3d at 308-09; *Calderon-Pena*, 383 F.3d at 258; *Landeros-Gonzales*, 262 F.3d at 426.

Respondent cites to a Texas state decision, *State v. Eakins*, 71 S.W.3d 443, 445 (Tex. App. 2002), for the proposition that "the absence of a finding of 'family violence'" does not necessarily mean that the trial court considered the issue and found that family violence was *not* involved. However, in *Eakins*, there was no finding at all related to family violence; the

judge neither found that it existed nor found that it did not exist. *Id.* at 444. In Petitioner's case, the trial judge affirmatively found that there was *no* family violence. (A.R. 110.) Thus Respondent's reliance on *Eakins* is misplaced.

Petitioner states again (a) that simple assault, without the presence of certain aggravating factors is not a crime involving moral turpitude; (b) that the conviction documents at hand show that there are no such aggravating factors in Petitioner's case; and thus (c) that Petitioner cannot be removed, as a matter, of law, under 8 U.S.C. § 1182(a)(2)(A)(ii) for being an alien convicted of two or more crimes involving moral turpitude since admission to the United States. Similarly, Petitioner cannot be removed, as a matter of law, under 8 U.S.C. § 1182(a)(2)(E)(i), for being an alien who has, at any time after admission to the United States, been convicted of a crime of domestic violence.

It is true, as Respondent pointed out in footnote 3, that Petitioner conceded this ground of removability at his removal hearing. However it is also the case that Petitioner has since then repeatedly challenged such grounds for removal. Petitioner is not removable as a matter of law if he was not convicted of a crime of domestic violence, regardless of what he conceded. An alien cannot be subject to removal simply by conceding to a charge if that charge is not supportable by law. See *Huerta-Guevara v. Ashcroft*, 321 F.3d 883, 886 (9th Cir. 2003) (holding that court may consider an issue regardless of purported waiver if it

is purely one of law and the opposing party will not suffer prejudice); *Tokatly v. Ashcroft*, 371 F.3d 613, 618 (9th Cir. 2004) (holding that petitioner had not waived his right to challenge on appeal IJ's erroneous reliance on testimonial evidence outside of the record of conviction where he raised the argument before the BIA).

Thus a finding that Petitioner was convicted of simple assault leads necessarily to the conclusion that he was not convicted of a second CIMT, and thus he cannot be removed under 8 U.S.C. § 1182(a)(2)(A)(ii); and by the same argument, he cannot be found to have been convicted of domestic violence, and cannot be removed under § 1182(a)(2)(E)(i). Although Respondent states that "That assumption is incorrect," no citation or further argument is given. Resp. Br. at 5, n.3.

2. Respondent further asserts that "the immigration laws do not mandate adoption of the categorical approach at all." Resp. Br. at 8. Respondent relies on two circuit court opinions: a panel opinion authored by Judge Easterbrook in the Seventh Circuit and a dissent authored by Judge Bea in the Ninth. *Ali v. Mukasey*, 521 F.3d 737, 743 (7th Cir. 2008); *Navarro-Lopez v. Gonzales*, 503 F.3d 1063, 1085 (9th Cir. 2007) (en banc) (Bea, J., dissenting). Respondent appears to be arguing that the BIA may be moving away from the categorical approach, and that the Seventh and Ninth Circuits recognize and defer to that movement. Resp. Br. at 8. This is an incorrect reading of the law.

The majority of the Ninth Circuit, *en banc*, held that the *Taylor-Shepard* categorical approach is the law "established by the Supreme Court." *Navarro-Lopez*, 503 F.3d at 1067. The majority specifically rejected Judge Bea's dissent as "plainly conflict[ing] with our precedent." *Id.* at 1067 n.4. As the Ninth Circuit Court explained:

> When the crime of conviction is missing an element of the generic crime altogether, we can never find that a jury was actually required to find all the elements of the generic crime. [The crime of conviction at issue] lacks an element of the generic crime – i.e., the moral turpitude, the requisite depravity. The crime of conviction can never be narrowed to conform to the generic crime because the jury is not required – as *Taylor* mandates – to find all the elements of the generic crime. Even if Navarro-Lopez had admitted to depraved acts, those admissions could not be used to modify the crime because they were not necessary for a conviction.

Id. at 1073. Judge Bea's dissent asserted that, "The question whether a state crime qualifies as a 'crime involving moral turpitude' within the meaning of 8 U.S.C. § 1182(a)(2)(A)(i)(I) cannot be answered, as the majority attempts to do, by turning to the categorical approach of *Taylor* . . . " because "there is no federal crime [of CIMT] to define." This dissent, joined only by Judge O'Scannlain, is a thin reed on which to hang Respondent's assertion that "the immigration laws do

not mandate adoption of the categorical approach at all." Resp. Br. at 8.

Judge Easterbrook's opinion also does not challenge the *Taylor-Shepard* categorical approach; it instead holds that an immigration judge can use a "presentence report to ensure that the judgment was not a mistake" and to "make the moral-turpitude classification, a matter that stands apart from the elements of the offense." *Ali*, 521 F.3d at 743. Judge Easterbrook here classifies whether a crime is one of moral turpitude as an extra-offense characteristic, rather than an element of the crime. This is not the holding of the Fifth Circuit, and it is not the legal grounds on which the Fifth Circuit in the instant case relied. Here, the Fifth Circuit looked, not to a presentence report, but to the charging instrument to determine the nature of the Petitioner's victim – an element of the crime – and from the allegation on the charging document concluded that the IJ's determination was not unreasonable. *Ali* is irrelevant to the case at hand.

As with the crime at issue in *Navarro-Lopez*, which was accessory after the fact, the crime at issue in the instant case, which is simple assault, lacks the element of depravity. Thus it cannot be found to be a crime involving moral turpitude as the jury is not required to find the depravity element of a CIMT. Although the charging document may state that the victim was Petitioner's wife, that was not a fact that needed to be proven, nor was it a fact found by the judge. On the contrary, the judge made an affirmative

finding of fact that there was no family member involved. The IJ's finding that Petitioner was convicted of a CIMT was an error of law; the BIA's upholding of that finding was an error of law; the Fifth Circuit's opinion upholding of that finding was an error of law. The Supreme Court's precedents, in *Taylor* and *Shepard*, were not followed. This Court should not allow this to stand.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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